FILED
JAN 9 1997
CLERK

No. 96-243

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BERNADINE SUITUM,
Petitioner,
v.
TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ROBERT BRAUNEIS
Associate Professor of Law
The George Washington University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6138

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner's as-applied regulatory takings claim is ripe when the merits of that claim turn on her contention that the transferable development rights (TDRs) to which she is entitled are a "ruse" lacking any market value, yet she has declined to make any effort to sell those TDRs she already possesses, to exercise her opportunities to obtain additional TDRs, or to apply for agency approval of any TDR sales.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. *LUCAS* IS IRRELEVANT TO THE RIPENESS OF SUITUM'S TAKINGS CLAIM	6
A. TRPA's Regulations Have Not Rendered Suitum's Land Valueless	8
B. TRPA's Regulations Have Not Rendered Suitum's Land Useless	13
C. *Lucas* Cannot Reasonably Be Expanded To Create An Absolute Right To Place Impermeable Cover On Land	16
D. *Lucas* Cannot Reasonably Be Expanded To Create An Absolute Right To Build A House On "Residential Property"	18
II. THE QUESTION WHETHER TRANSFERABLE DEVELOPMENT RIGHTS COULD EVER SAVE LAND-USE REGULATION THAT WOULD OTHERWISE RUN AFOUL OF *LUCAS* SHOULD NOT BE RESOLVED AS AN ABSTRACT, HYPOTHETICAL MATTER	21
A. The Court Should Not Reconsider In This Case Its Holding In *Penn Central* That TDRs Constitute A "Use" Of Property	22

TABLE OF CONTENTS—Continued

	Page
B. Any Abstract Pronouncement Will Likely Lead To Unnecessary Litigation About A Wide Variety Of Existing TDR Programs	25
CONCLUSION	29
APPENDICES	1a

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. United States, 364 U.S. 40 (1960)	26
Board of Regents v. Roth, 408 U.S. 564 (1972)	27
Bowles v. United States, 31 Cl. Ct. 37 (1994)	23-24
California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985)	2
Carpenter v. Tahoe Regional Planning Agency, 804 F.Supp. 1316 (D. Nev. 1992)	13
Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996)	13, 15
Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995)	12
Formanek v. United States, 26 Cl. Ct. 332 (1992)	15
Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991)	28
Gorieb v. Fox, 274 U.S. 603 (1927)	16
Hadacheck v. Sebastian, 239 U.S. 394 (1915)	11-12
In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988)	23
Kelly v. Tahoe Regional Planning Agency, 855 P.2d 1027 (Nev. 1993), *cert. denied*, 510 U.S. 1041 (1994)	1, 2, 20
Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994)	4-5
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	26
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	*passim*
Lynch v. United States, 292 U.S. 571 (1934)	26
Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990)	8
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	7
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	26
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	26
Richards v. Washington Terminal Co., 233 U.S. 546 (1914)	26
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	26, 27
West Montgomery Cty. Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n, 522 A.2d 1328 (Md. 1987)	28
Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	5
United States v. Causby, 328 U.S. 256 (1946)	26
United States v. Fruehauf, 365 U.S. 146 (1961)	22
Yee v. City of Escondido, 503 U.S. 519 (1992)	8
Ordinances	
D.C. Mun. Regs., tit. 11, § 1709	27
Metropolitan Dade County, Fla., Code ch. 33B, art. II, div. 3	28
Metropolitan Dade County, Fla., Code § 33B-45	28
San Francisco, Ca., Planning Code § 128	27
Tahoe Regional Planning Agency Ordinance No. 4, § 9.11	20
Tahoe Regional Planning Agency Ordinance No. 4, § 9.14	20
Other Authorities	
James Madison, *Republican Distribution of Citizens*, in The Mind of the Founder: Sources of the Political Thought of James Madison (Marvin Meyers ed., rev. ed. 1981)	18
Maryland-National Capital Park & Planning Commission, *Plowing New Ground* (rev. ed. 1990)	27-28
Terrence D. Moore, *New Jersey's Special Place: The Pinelands National Preserve*, New Jersey Lawyer, April 1996	28
Restatement (Second) of Property, Landlord & Tenant § 1.6 Statutory Note (1977)	25

TABLE OF AUTHORITIES—Continued

	Page
Rutherford H. Platt, *Land Use and Society* (1996)	17
Rick Pruetz, *Putting Transfer of Development Rights to Work in California* (1993)	27, 28
James T. B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 Yale J. on Reg. 369 (1989)	28
U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996* (1996)	17

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in the substantive and procedural law of regulatory takings. State and local governments are responsible for most of the land-use regulation in this country, and modern regulatory takings law has focused on land-use regulation. This case, involving a takings challenge to a program of land-use regulation designed to preserve a threatened natural resource, falls squarely within that focus. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

In 1989, petitioner Bernadine Suitum applied to respondent Tahoe Regional Planning Agency (TRPA) for permission to construct a house on her land in Incline Village, Nevada. First Amended Complaint, J.A. 15. Experts engaged by TRPA inspected the land and discovered that it was covered with riparian plants and saturated with groundwater within two feet of the surface. TRPA Internal Memorandum, Aug. 5, 1990 (Ex. 2 in Support of Opp. to Def.'s Motion for Summary Judgment). Aerial photographs confirmed that the water was natural runoff from higher elevations, which flowed along a drainage channel along the back of the land and into Lake Tahoe. *Id.*

Scientists have determined that when landowners cover riparian land like Suitum's with impermeable surfaces such as pavement or building foundations, they discharge nutrient-filled water downstream. *See Kelly v. Tahoe Regional Planning Agency*, 855 P.2d 1027, 1028-29 (Nev. 1993), *cert. denied*, 510 U.S. 1041 (1994). These discharges harm lakes such as Lake Tahoe because they cause algae to grow, clouding the lake water. *See id.* at

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

1029. Lake Tahoe has had clear water for about 10,000 years. *See id.* at 1028. In 1984, an expert estimated that the increase in nutrient-filled discharges in the Lake Tahoe Basin, if unchecked, would lead to loss of Lake Tahoe's clarity in 40 years. *See California ex rel. Van De Camp v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1312-13 (9th Cir. 1985).

In order to limit landowners' production of these discharges, TRPA adopted a set of regulations limiting "land coverage"—the placement of impermeable surfaces on land—in Lake Tahoe Basin. Regulations applicable to land such as Suitum's, located in what TRPA terms a "stream environment zone" (SEZ), allow virtually "no new land coverage." Order of District Court, Nov. 23, 1993 (1993 Order), J.A. 86-87; Ex. B to Aff. of S. E. Scholley in Support of Motion for Summary Judgment (Scholley Aff.) (excerpt from Regional Plan For The Lake Tahoe Basin, Goals And Policies, Tahoe Regional Planning Agency, Sept. 17, 1986), J.A. 26-27.

As a means of preserving some of the development opportunities that SEZ landowners would otherwise lose due to these regulations, TRPA implemented a transferable development right (TDR) program. The TDR program enables SEZ landowners to transfer certain rights to other qualifying parcels of land in the area, allowing more intensive or earlier development of those parcels than would otherwise be permitted. Because TRPA has found it important to limit (1) the total land coverage in the Lake Tahoe Basin, (2) the total number of residences, and (3) the rate of residential development, the TDRs have three components, corresponding to these three aspects of regulation: Land Coverage Rights, Residential Development Rights, and Residential Allocations. TRPA's Memorandum Concerning Its Transfer Of Development Program (TRPA TDR Mem.), J.A. 91-93; Aff. of S. E. Scholley in Support of Motion for Summary Judgment (Scholley Aff. II), J.A. 144, 145. A landowner who

wishes to build on land needs all three of these components. Scholley Aff. II, J.A. 145. TRPA regulations credit Suitum with 183 square feet of Land Coverage Rights and one Residential Development Right (representing one single-family house or unit). TRPA TDR Mem., J.A. 92; Scholley Aff. II, J.A. 145. Suitum is also eligible to apply for a Residential Allocation in the annual drawing in which they are distributed, and to receive three bonus Residential Development Rights if she agrees to record permanent covenants restricting her property. Scholley Aff. II, J.A. 145-48.

Suitum sued TRPA in the district court, claiming that the application of TRPA regulations to her land constituted a taking of private property for public use without just compensation. First Amended Complaint, J.A. 16. TRPA moved for summary judgment, arguing that Suitum's takings claim was not ripe.

The district court ordered the parties to submit supplemental briefs on the specific issue whether Suitum's failure to pursue sale of her TDRs rendered her takings claim unripe. Suitum's only argument in her supplemental brief was that the TDRs were worthless, rendering pursuit of their sale a futile act. Plaintiff's Response to TRPA's Mem. Concerning TDR Program, Court Record (CR) 77, at 1-2. The district court, however, found inadmissible the only evidence Suitum offered to support her assertion that the TDRs were worthless.[2] TRPA, by contrast, presented credible expert testimony that the TDRs had substantial value. Appraiser Stephen R. Johnson estimated that Land Coverage Rights were worth between $6.00 and $12.00 per square foot, Affidavit of S. R. Johnson in

[2] Suitum's evidence was the affidavit of Paul Kaleta, a former TRPA employee whom Suitum belatedly sought to qualify as an expert witness. The district court found that Kaleta was not qualified to give expert testimony on the valuation of TDRs (or on other aspects of TRPA regulation). Pet. App. C-2 n.1. That finding was affirmed by the court of appeals, *id.* at A-11, and was not challenged in Suitum's petition for certiorari.

Support of Motion for Summary Judgment (Johnson Aff.), J.A. 131-32, that Residential Development Rights were worth between $1500 and $6000 per unit, and that Residential Allocations were worth between $9000 and $20,000 each. Supplemental Affidavit of S. R. Johnson in Support of Motion for Summary Judgment (Suppl. Johnson Aff.), J.A. 142-43.

On this evidence, the district court rejected Suitum's futility argument, and held that her takings claim was not ripe because the value of the TDRs was "significant to the takings calculus" announced by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and remained uncertain so long as Suitum made no attempt to sell the TDRs. 1994 Order, J.A. 152. The *Penn Central* takings analysis, of course, is the "ad hoc, factual inquir[y]," *Penn Central*, 438 U.S. at 124, that this Court has prescribed for cases that do not fall within per se takings categories such as the "deni[al of] all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The district court specifically noted that Suitum's land might have "significant residual value" apart from the value of the TDRs, confirming that it assumed the appropriate framework for deciding the underlying takings issue was the ad hoc approach announced in *Penn Central*. 1994 Order, J.A. 152.

On appeal, Suitum failed to challenge the district court's assumption that the value of the TDRs was relevant to her takings claim. Instead, she continued to argue that any attempt to sell the TDRs would be futile because the TDRs were worthless. Appellant's Opening Br. 19-21, 26; Reply Br. of Appellant 5-6. In rejecting her appeal on the ripeness issue, the court of appeals made clear that it, like the district court, presumed that the underlying takings claim would eventually be analyzed under the *Penn Central* test. As the court noted after citing *Penn Central*, " 'determining whether a regulatory action effects a taking requires complex factual assessments of the purposes and economic effects of government actions.' " Pet. App. A-7 (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 924 (1994)).

SUMMARY OF ARGUMENT

The only issue properly presented in this case is whether Suitum's as-applied takings claim is ripe. This Court can decide that issue by determining whether Suitum's failure to apply for transfer of her development rights has left uncertain the overall impact on Suitum of TRPA's land-use regulation, so that a court cannot determine the effect of the regulation "on the value of [Suitum's] property and investment-backed profit expectations." *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 (1985).

Suitum acknowledges that the Court can decide the ripeness issue within this settled framework. Pet. Br. 24-29. But she has devoted the bulk of her petition and brief to the argument that the Court should leave its settled framework behind, and use the ripeness issue as an opportunity to further elaborate the substantive law of takings. In particular, Suitum urges this Court to redefine the per se takings category announced in *Lucas*, to encompass not only a right to economically beneficial use, but an indefensibly broader right to place impermeable cover on land or build a house on "residential property." Pet. Br. 32. Suitum then entreats the Court to declare that the provision of transferable development rights could never save a land-use restriction that would otherwise fall into the newly augmented *Lucas* per se category. *Id.* at 32-34.

Suitum's failure to present these arguments to either court below—extending to a failure even to mention *Lucas*—has left this case without the factual findings necessary to present as live issues these serious matters of substantive takings law. *Amici* believe that the orderly

development of substantive takings law would be ill-served by an attempt to address such matters outside a concrete factual context. Thus, although *amici* agree with respondent that Suitum's claim is not ripe, *amici*'s long-term interest in the orderly development of substantive takings law leads to a particular interest in demonstrating that the ripeness issue in this case can and should be decided without advisory pronouncements on substantive takings issues.

ARGUMENT

I. *LUCAS* IS IRRELEVANT TO THE RIPENESS OF SUITUM'S TAKINGS CLAIM

The court of appeals held that Suitum's failure to pursue sale of her transferable development rights rendered her takings claim unripe. In her petition and brief on the merits, Suitum attacks the court of appeals' judgment with an entirely new argument, which neither court below had the opportunity to address. Suitum now claims that, without the provision of the TDRs, TRPA's regulation of her land would have deprived it of all economically beneficial use, causing that regulation to fall into the per se takings category recognized in *Lucas*. Pet. Br. 1, 2, 30-32; *see Lucas*, 505 U.S. at 1015. In fact, neither court below had occasion either to make or to reject such a finding, since Suitum's reference to *Lucas* in her petition is the first mention of *Lucas* in the history of this case. Having refashioned her claim as a *Lucas* per se takings claim, Suitum then argues that her failure to market the TDRs does not render her claim unripe because TDRs are irrelevant to *Lucas* per se takings claims. Pet. Br. 12-15, 32-34.[3] Suitum's belated attempt in this Court to recast

[3] A portion of Suitum's brief can be read as arguing that TDRs are irrelevant to the issue of ripeness even if they are relevant to the underlying substantive takings claim. Suitum points to language in this Court's decisions noting that a landowner's takings claim is not ripe if she "has not yet obtained a final decision regarding how [she] will be allowed to develop [her] property," *Williamson County*, 473 U.S. at 190, because a court, before adjudicating a takings claim, must know "the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). This language, Suitum argues, indicates that the ripeness inquiry focuses solely on the uses allowed on the parcel the landowner claims has been taken, and excludes TDRs. Pet. Br. 12-15.

Suitum's reading of *Williamson County* and *MacDonald, Sommer & Frates*, however, confuses the general principle of those cases with its application to their particular facts. The general principle is that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. On the particular facts of each case, neither of which involved TDRs, a court would indeed know "how far the regulation[s went]" when it knew "the type and intensity of development legally permitted on the subject property." *Id.* at 348. But in cases in which TDRs "are to be taken into account in considering the impact of regulation," *Penn Central*, 438 U.S. at 137, a court must know their quantity and value to know "how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. Suitum's apparent suggestion to the contrary makes no sense, as it would force a court to decide a takings claim with incomplete information.

her case as a child of *Lucas*, however, is not only procedurally inappropriate, but substantively flawed.

Suitum does not challenge this Court's holding in *Penn Central*, 438 U.S. at 137, that TDRs must be considered in ordinary takings analysis. Therefore, to lay a foundation for her argument, she must first establish that TRPA's restrictions on the use of her land, without the TDRs, would in fact work a per se taking under *Lucas*, removing her case from the ordinary *Penn Central* inquiry. But Suitum's failure to develop her *Lucas* argument at any earlier stage of this litigation has produced a record that cannot support this claim under any reasonable interpretation or elaboration of *Lucas*. As demonstrated below, Suitum's property is neither valueless nor useless, and *Lucas* cannot reasonably be expanded to protect an absolute right to place impermeable cover on land or to build a house on "residential property."

Thus, this case exhibits in extreme form the defects that have made this Court reluctant to consider arguments advanced for the first time in a petition for certiorari. Suitum has asked this Court to consider her principal argument, not only "without the benefit of a full record," *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552 n. 3 (1990), but without the benefit of a record that supports an essential step in that argument. She has requested this Court to proceed, not only without "the benefit of . . . lower court opinions squarely addressing" her argument, *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992), but without the benefit of *any* lower court reflection on that argument. Faced with such irremediable defects, this Court can and should resolve the ripeness issue presented in this case without addressing complex, fact-intensive questions about the treatment of transferable development rights in a *Lucas* per se takings inquiry.

A. TRPA's Regulations Have Not Rendered Suitum's Land Valueless

Lucas requires, as an essential predicate for a taking, a finding that regulation has left land without any market value. In *Lucas*, a South Carolina trial court had found that state regulation had rendered Lucas's beachfront land "valueless."[4] 505 U.S. at 1007, 1020. According to the *Lucas* Court, the question presented in *Lucas* was whether this "dramatic effect on the economic value of Lucas's lots" caused the regulation to run afoul of the Takings Clause. *Id.* at 1007. Lucas's claim, elaborated the Court, concerned the State's "*complete extinguishment* of his property's value," *id.* at 1009 (emphasis added); previous Supreme Court cases were distinguishable because

[4] Four Justices questioned the correctness of this finding. *See Lucas*, 505 U.S. at 1033-34 (Kennedy, J., concurring in the judgment); *id.* at 1043-44 (Blackmun, J., dissenting); *id.* at 1065 n.3 (Stevens, J., dissenting); *id.* at 1076 (statement of Souter, J.).

"[n]one of them . . . involved an allegation that the regulation *wholly eliminated* the value of the claimant's land." *Id.* at 1026 (emphasis added).

Lucas's focus on the economic value of the claimant's land necessarily means that the very same regulation may work a categorical taking as applied to one parcel of land, but not as applied to another. For example, a law that permitted land to be used only for cattle grazing and did not credit landowners with any transferable rights might leave a rural parcel with considerable economic value; indeed, cattle grazing might be the *most* valuable use of the parcel. Yet the same law might render an urban lot completely valueless. If the constitutionality of a single law can vary from case to case, so much more can the constitutionality of two laws that are similar, as Suitum argues the TRPA regulations and the *Lucas* beachfront restrictions are. These differing outcomes, however, do not expose a weakness of *Lucas*'s focus on value; they reveal its strength. As the *Lucas* Court noted, although the Takings Clause may protect "a number of noneconomic interests," this Court's cases have long placed protection of "the productive use of, and economic investment in, land" at the center of Takings Clause jurisprudence. *Id.* at 1020 n.8. The *Lucas* category is designed to identify the circumstances under which the impact on those economic interests will trump other considerations normally relevant to takings analysis. That impact will necessarily differ from case to case.

If the *Lucas* per se category protects market value, Suitum's claim that TRPA's restrictions work a per se taking fails, because neither district court findings nor record evidence support a conclusion that Suitum's property lacks market value. To the contrary, the district court explicitly acknowledged that, even if Suitum had completed a transfer of the development rights associated with her parcel, the land might have "significant residual

value." 1994 Order, J.A. 152. This acknowledgment was undoubtedly prompted by the testimony of appraiser Johnson that provided the only admitted evidence about the value of Suitum's parcel. Johnson testified that parcels similar to Suitum's had sold for between $7,125 and $18,750 after being encumbered with open space easements that were more restrictive than the TRPA regulations applicable to Suitum's land. Johnson Aff., J.A. 123, 132; Ex. A to Suppl. Johnson Aff. (District Ct. Docket Entry No. 90). Johnson also testified that two similar parcels with intact development rights had sold for $25,000 and $32,000. Suppl. Johnson Aff., J.A. 143.

Because there is no evidence in the record about the value of a buildable lot in Suitum's subdivision—another indication of the immature factual development of this case—the diminution in value caused by the TRPA restrictions (disregarding the value of the TDRs) is subject only to a very rough estimate. Tax assessment records available for nine of the approximately twenty lots on Mayhew Circle, the street on which Suitum's land is located, indicate that in 1993 the "Market Land Value" of each lot (excluding the value of improvements) was assessed at $104,417.[5] If Suitum's land, subject to TRPA

[5] These records are available in the NVOWN file of the ASSETS library in the LEXIS online database. Some of the lots are slightly smaller than Suitum's, and some are slightly larger. (Suitum's lot is approximately 18,300 square feet in size. *See* Affidavit of Lyn Barnett in Support of Motion for Summary Judgment, J.A. 96, 97. Its street address is 159 Mayhew Circle, *see* Pet. Br. 2, placing it between 155 Mayhew Circle and 165 Mayhew Circle.) All of the lots are assessed at the same "Market Land Value," indicating that the assessment is a rough one:

Address	Square Footage	1993 Market Land Value	Year House Constructed
121 Mayhew Cir.	22000	$104,417	1965
125 Mayhew Cir.	20700	$104,417	1965
130 Mayhew Cir.	15200	$104,417	1973
142 Mayhew Cir.	15500	$104,417	1965
143 Mayhew Cir.	17400	$104,417	1979
151 Mayhew Cir.	17500	$104,417	1980
155 Mayhew Cir.	15600	$104,417	1979
165 Mayhew Cir.	20300	$104,417	1979
170 Mayhew Cir.	14100	$104,417	1965

restrictions but without the value of the TDRs, is now worth $12,946—the average sales price of the seven restricted lots used as comparables by assessor Johnson[6]—then the TRPA restrictions have reduced the value of Suitum's land by 87.6%.

Although an 87.6% diminution in value is substantial, the *Lucas* Court specifically acknowledged that a landowner burdened by an even larger diminution—95%—would not be able to claim the benefit of the Court's "deprivation of all economically beneficial use" category. *See Lucas*, 505 U.S. at 1019 n.8. That landowner's case, the Court held, would be properly considered under the test formulated in *Penn Central*, which treats the economic impact of the challenged regulation as only one of a number of relevant factors. *Lucas*, 505 U.S. at 1019-20 n.8. According to the *Lucas* Court, only "the landowner who suffer[ed] a complete elimination of value"—not 95%, but 100%—would be entitled to just compensation under its per se category. *Id.* at 1019 n.8. Like the owner subject to the more substantial 95% diminution, Suitum should "not be able to claim the benefit of [*Lucas*'s] categorical formulation."[7] *Id.*; *cf. Hadacheck v. Sebas-*

[6] *See* Exhibit A to Supplemental Affidavit of Stephen R. Johnson in Support of Motion for Summary Judgment. Although the Supplemental Affidavit is reprinted at J.A. 139, Exhibit A is available only in the district court record. The seven sales reported by Johnson were for $13,000; $16,000; $10,000; $16,750; $18,750; $7,125; and $9,000.

[7] Under *Lucas*, once a landowner has shown a total loss in value, the government may still avoid a finding of constitutional infirmity if it can show that its regulation does no more than make explicit previously existing common law principles of nuisance and property. *See Lucas*, 505 U.S. at 1029-1031. It is to this secondary

tian, 239 U.S. 394, 405 (1915) (upholding an ordinance which reduced a parcel of land's value from $800,000 to $60,000, a 92.5% diminution).

To be sure, it may be sound constitutional policy to exclude certain types or sources of value from consideration when asking whether a regulation has rendered a parcel of land "valueless" within the meaning of *Lucas*. For example, speculators may be willing to purchase land at a deep discount to gamble on the possibility that the legislature will repeal the regulation that has rendered the land valueless. This Court might choose to exclude such "political speculation value" from the threshold *Lucas* analysis on the ground that the potential of repeal should not be a factor in considering whether regulation currently in force works an unconstitutional taking. *But see Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1566-67 (Fed. Cir. 1994) (speculative market cannot be disregarded in establishing fair market value in takings case), *cert. denied*, 115 S.Ct. 898 (1995).

This Court might also choose to exclude value arising from illegal activities. For example, evidence that marijuana cultivators were willing to pay handsome prices for certain parcels of land subject to severe environmental regulation might not be admissible even if the regulation generally allowed horticultural uses, on the ground that consideration of such "illegal use value" violated public policy. Suitum, however, has not alleged that the value of her land as regulated is attributable to some source that

---

"nuisance exception" inquiry that the issue whether a regulation prohibits "occupiable improvements," Pet. Br. at 31, may be relevant, since the regulation must be compared to common law principles that may have preserved some opportunity for the landowner to "erec[t] habitable or productive improvements on [his] land." *Lucas*, 505 U.S. at 1031. Suitum's assertion that regulation prohibiting "occupiable improvements" runs afoul of *Lucas* confuses this secondary inquiry with the initial, threshold inquiry, which is limited to the issue whether the regulation has eliminated all market value of the landowner's land.

should be excluded, and there is no evidence in the record that the value stems from such a source.[8] Thus, Suitum's case falls short of the requirements for inclusion in the *Lucas* per se takings category.

B. TRPA's Regulations Have Not Rendered Suitum's Land Useless

Suitum argues vigorously that this Court's formulation in *Lucas* focuses not on the value of property, but on its use. Pet. Br. 31-32. Suitum's primary goal in pressing this distinction is to construct a foundation for her argument that TDRs do not constitute a "use" of property relevant to the *Lucas* analysis, an argument addressed in Part II of this brief. But even if this argument were properly before this Court, Suitum would first need to convince this Court that, absent the TDRs, TRPA's restrictions on her land would work a per se taking under *Lucas*, since she does not challenge this Court's holding in *Penn Central*, 438 U.S. at 137, that the value of TDRs is relevant to takings analysis generally. Here, however, the distinction between "use" and "value" does not aid Suitum, because TRPA's restrictions do not render her land "useless" any more than they render it "valueless."

---

[8] There is evidence in the record that, in addition to the private market for Suitum's land, there was and still may be a public market: the State of Nevada offered Suitum $35,000 for her land, an offer which she rejected. *See* Suppl. Johnson Aff., J.A. 141. Some courts have questioned whether such a public market should be considered in takings analysis. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.2d 1422, 1432 (9th Cir. 1996) (holding that a sale of land to the government for $800,000 more than the takings claimant paid for it did not preclude a jury finding that government restrictions on the land worked a taking); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316, 1327 (D. Nev. 1992) (holding that a takings claimant's sale of land to the government did not entitle the government to summary judgment on her regulatory takings claim). This case, however, does not raise that issue, since uncontroverted evidence suggests that there is a substantial private market for Suitum's land aside from any public market.

The district court understood Suitum to be seeking damages "because she [was] not allowed to build a residence on [her] property," not because she was unable to make any use of the property whatsoever. 1994 Order, J.A. 150. This understanding comported with the only admitted evidence on the issue, which indicated that TRPA regulations would allow a variety of uses on Suitum's land.[9] Susan E. Scholley, a TRPA attorney, testified that "a structure or activity, that allows 75 percent or more of the precipitation to reach the ground and permits the growth of vegetation, could be placed on the property." Scholley Aff. II, J.A. 149. Because Scholley was responding to Suitum's specific assertion that no adjoining homeowner could possibly be interested in purchasing her land, Scholley listed a number of items qualifying under this standard that would typically be useful to adjoining homeowners: "chaise lounges and patio table[s], jungle gyms, swing sets, pet enclosures, picnic table[s], volleyball or badminton sets, and garden trellises." *Id.* In addition, Scholley testified that TRPA regulations "permit[ted] gardening and landscaping" of Suitum's land, "subject to standard TRPA limitations," and also permitted fencing of the land. *Id.*

Suitum represents to this Court that "TRPA's regulations allow Mrs. Suitum to make no more use of her land than if a company of troops had permanently encamped there." Pet. Br. 33. Scholley's uncontroverted testimony, however, reveals this vivid analogy to be an unsupported flight of fancy. Not only does Suitum retain her right to exclude others, military or civilian, from her land; she also may garden, landscape, fence, and place qualifying structures on it, uses precluded by her figmental barracks.

[9] Suitum wrongly asserts that "there is disagreement in the record below concerning [her] remaining ability" to use her land. Pet. Br. at 32. The affidavit that she relies on to create the disagreement was excluded by the district court because the affiant did not demonstrate "any knowledge, skill, experience, training or education which would qualify him to testify as an expert." Pet. App. C-2 n.1. There is no disagreement in the admitted evidence.

Suitum has cited no case that has applied the *Lucas* Court's formula of "economically beneficial use" to find a per se taking even though land retains a demonstrable market value, perhaps because no case that has even arguably done so would help her.[10] The only admitted evidence on the issue suggested that the market for parcels of land such as Suitum's was generated by neighbors interested in using them for normal residential activities such as gardening, recreation, and the pursuit of various hobbies. Suppl. Johnson Aff., J.A. 140; Scholley Aff. II, J.A. 144, 149. Because normal residential uses are precisely the kinds of uses that would make Suitum's land valuable even in the absence of regulation, there is no reason why such uses should be excluded from consideration under *Lucas*.[11]

[10] *Amicus* Tahoe-Sierra Preservation Council, Inc. (Br. at 29 n.13) suggests that this Court look to *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996). In *Del Monte*, the court, in the course of upholding a jury's finding that city regulation of plaintiff's land worked a taking, suggested that evidence that someone might offer plaintiff some amount of money for the land did not necessarily preclude a finding that the regulation worked a per se taking under *Lucas*. *Id.* at 1432-33. The *Del Monte* court relied heavily on *Formanek v. United States*, 26 Cl. Ct. 332 (1992), a pre-*Lucas* case which held that offers from two conservation groups to purchase land for the purpose of maintaining it in its natural state did not establish that the land had a sufficient market value to foreclose a takings claim. *Id.* at 340. Whatever the merits of the *Formanek* decision, however, it has no application to Suitum's case, since there is no record evidence indicating that the market for Suitum's land is created by conservation groups wishing to preserve it in its natural state.

[11] TRPA also presented testimony that neighbors might be interested in acquiring adjacent land to control the uses and activities that might occur on it, Suppl. Johnson Aff., J.A. 140, and that a neighbor would be able to fence the property to provide privacy, using it as a buffer. Scholley Aff. II, J.A. 149. Suitum has not suggested any reason that use to provide privacy or as a buffer should be excluded from the *Lucas* analysis. Much of the residential land in this country is so used. Private owners value land as a buffer for many of the same reasons that motivate local

C. *Lucas* Cannot Reasonably Be Expanded To Create An Absolute Right To Place Impermeable Cover On Land

Suitum places great emphasis on the district court's remark that it "understood that plaintiff may not develop or build on the parcel of land she owns." 1993 Order, J.A. 88; *see* Pet. Br. 4, 13, 31. This remark, however, is no more than the district court's acknowledgement that, because Suitum's land lies within a stream environment zone, she cannot seal off her land with impervious cover that would prevent water from draining through the soil.[12] 1993 Order, J.A. 87 (noting that TRPA's 1987 Regional Plan allowed virtually "no new land coverage" within stream environment zones); Scholley Aff. II, J.A. 145 (stating that "land coverage" means "cover[age] by impervious surface, such as [a] residence, driveway and decks"). Thus, the district court's remark would bear on Suitum's per se takings claim only if *Lucas* were stretched to create an absolute right to place impermeable cover on land. Such an extension, however, is inconsistent with *Lucas*'s rationale and has no other historical or functional basis.

The central insight of *Lucas* is that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S.

governments to enact setback ordinances like the one approved by this Court seventy years ago in *Gorieb v. Fox*, 274 U.S. 603, 609 (1927): it "afford[s] room for lawns and trees, keep[s] the dwellings farther from the dust, noise, and fumes of the street, add[s] to the attractiveness and comfort of a residential district, and . . . reduce[s] the fire hazard."

[12] Indeed, the district court explained that a score of zero under TRPA's Individual Parcel Evaluation System amounted to "a prohibition of new land coverage"; in a footnote to that very sentence, the court referred to the zero score's effect as prohibiting Suitum "from building," signaling that it was using "building" as a colloquial abridgment of "new land coverage." 1993 Order, J.A. 87 & n.3.

at 1017. A right to place impermeable cover on land plainly has no place in this equation. Of the approximately 2.1 billion acres of land in the United States, *see* Rutherford H. Platt, *Land Use and Society* 6 (1996), the vast majority is devoted to uses that do not involve impermeable cover. As of 1992, for example, 979 million acres of land was devoted to farming, and 737 million acres was forest land.[13] *See* U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996*, 664, 685 (1996). Yet those uses are enormously productive and economically beneficial. In 1992, for example, the gross farm product was 80.6 billion dollars; the total value of timber cut was 938 million dollars. *Id.* at 666, 685. Thus, economic wipeout and its practical equivalence to physical appropriation—the justification for the *Lucas* category as it now stands—cannot support an extension of the category to encompass all bans on impermeable cover.[14]

Suitum has failed to identify any other viable justification for such an extension. Because the vast majority of American land is not and never has been covered by impermeable surfaces, there is no support in custom or historical tradition for recognizing a per se right to impermeable cover. Nor can such a right be derived from

[13] Of course, a miniscule portion of these lands is covered by impermeable surface, supporting structures such as barns and silos. The land that actually produces crops and timber and provides forage for livestock, however, is not so covered, and prohibiting impermeable cover on that land would not affect its productivity.

[14] The value of Suitum's property appears to be attributable not to potential agricultural uses, which the property's size and location might render infeasible even in the absence of regulatory constraints, but to normal residential uses. *See supra* p. 14. When Suitum contends that *Lucas* should be extended to protect a right to "develop," however, she is proposing a category that would apply equally to all land in the United States. If application of that category to farms and forests—a majority of that land—cannot be squared with *Lucas*'s central rationale, then the proposal lacks merit.

private property's function of providing "a bulwark of personal autonomy against . . . the state." Pet. Br. 22. In fact, in traditional American thought, the idea that ownership of land promotes personal autonomy is specifically connected with agricultural use of land. As James Madison put it:

> The class of citizens who provide at once their own food and their own raiment, may be viewed as the most truly independent and happy. They are more; they are the best basis of public liberty and the strongest bulwark of public safety.

James Madison, *Republican Distribution of Citizens*, in The Mind of the Founder: Sources of the Political Thought of James Madison 185 (Marvin Meyers ed., rev. ed. 1981). A radical fidelity to this ideal of agrarian independence would conceivably *require* public restrictions on impermeable cover, to preserve tillable land, rather than preclude them.

D. *Lucas* Cannot Reasonably Be Expanded To Create An Absolute Right To Build A House On "Residential Property"

Suitum's last effort to tie her case to *Lucas* involves the argument that *Lucas* creates an absolute right to build a home on "residential property." Pet. Br. 32. A closer look at the ambiguous term "residential property," however, reveals that it is not susceptible of a definition suitable to serve as the basis for a per se takings category. Perhaps, by "residential property," Suitum means land on which, but for the challenged regulation, residential use would be legally permitted, or on which residential use had been legally permitted before enactment of the regulation. Under this definition, however, the proposed per se takings category would be absurdly large. Governments could never prohibit homebuilding on land on which residential use was once allowed, and even a ban on residential use that had existed time out of mind would be vulnerable to the argument that, absent that ban, homebuilding would be legal.

Alternatively, by "residential property" Suitum may mean land adjacent to, or surrounded by, other land that is in fact used for residential purposes. Yet a per se rule making compensable any prohibition of residential use on land surrounded by other residences does not seem worthy of serious consideration. Of course, the fact that many of Suitum's neighbors have houses on their parcels is relevant to ordinary takings analysis under *Penn Central*. Absent further explanation, such disparity may raise equal protection concerns. *Cf. Lucas*, 505 U.S. at 1035-36 (Kennedy, J., concurring in the judgment) (the timing of a ban on construction enacted after "the property had been zoned for individual lot development and most other parcels had been improved . . . must be measured in the balance"). Further explanation, however, may relieve such concerns. In Suitum's case, because the district court granted summary judgment on the issue of ripeness, the relevant facts about the neighbors' existing residential uses were never fully developed. Information available from public records, however, suggests that Suitum's claim of unequal treatment may be considerably weaker than she intimates it is.

On February 10, 1972, more than six months before Suitum bought her land,[15] TRPA adopted Ordinance No. 4, which contained a comprehensive set of land-use regulations for the Lake Tahoe Basin. Ordinance No. 4 included a Land Capability Map that classified the general area in which Suitum's land was located as "Land Capability District No. 6," the source of Suitum's claim that her land "was classified as suitable for residential construction." Pet. Br. 2 n.1. The Land Capability Map, however, explicitly noted that it was to be used only as a

[15] Suitum purchased her land on September 7, 1972. *See* Deposition of Bernadine Suitum, at 14 (June 23, 1993).

rough guide. In particular, it noted that because areas such as Suitum's "locally contain riparian zones along stream courses that meet the criteria for class 1b [stream environment zone], although shown on the map as class 7 [,] . . . final land capability classification for individual parcels should be based on detailed site evaluation." TRPA Ordinance No. 4, Land Capability Map (excerpted in Appendix A to this brief).

Although Ordinance No. 4 placed stringent limitations on parcels classified as class 1b, as Suitum's ultimately was, it also contained a "grandfather" provision that was obviously designed to protect the reasonable investment-backed expectations of subdivision lot owners such as Suitum. The grandfather provision, in force until 1980,[16] allowed owners of lots in subdivisions approved before 1972 to construct single-family houses even though the lots were otherwise subject to more restrictive regulation. *See* TRPA Ordinance No. 4, §§ 9.11, 9.14 (excerpted in Appendix B to this brief). Over half of Suitum's neighbors on Mayhew Circle for whom tax records are easily available, including both of her immediate neighbors, built their houses during the eight-year period the grandfather provision was in force. *See supra* n.5. Thus, Suitum and her neighbors may have had an equal, reasonable opportunity to fulfill their investment-backed expectations. Further factual development may increase or diminish the importance of the Land Capability Map proviso and the grandfather provision; on the record before this Court, nothing more than uninformed speculation is possible.

In sum, given the district court's findings and the record in this case, TRPA's restrictions on Suitum's land do not amount to a per se taking under *Lucas* based on any

[16] In December 1980, Nevada and California, with Congressional approval, extensively amended the Compact that had created TRPA, leading to the passage of ordinances that superseded Ordinance No. 4. *See, e.g., Kelly v. Tahoe Regional Planning Agency*, 855 P.2d at 1030 n.4.

reasonable interpretation or extension of that case. The expansion of the per se takings category that Suitum seeks—to encompass any ban on impermeable cover, or any ban on homebuilding on "residential property"—would tear the category from its original rationale and leave it bereft of any historical or functional justification.

II. THE QUESTION WHETHER TRANSFERABLE DEVELOPMENT RIGHTS COULD EVER SAVE LAND-USE REGULATION THAT WOULD OTHERWISE RUN AFOUL OF *LUCAS* SHOULD NOT BE RESOLVED AS AN ABSTRACT, HYPOTHETICAL MATTER

The nub of Suitum's principal argument in this Court is that her TDRs do not constitute a "use" of her pre-existing property rights, and therefore should be excluded from consideration when determining whether TRPA's regulations have left her with any "economically beneficial use" of her property. Pet. Br. 12-15, 19, 22, 33-34. This Court has already considered and rejected such an argument in a fully developed factual context. The Court held in *Penn Central* that a prohibition on building above Grand Central Terminal did not "den[y] *all* use of [appellants'] pre-existing air rights" because the rights were "made transferable to at least eight parcels in the vicinity of the Terminal." 438 U.S. at 137.

Because no amount of tugging and twisting will wring a *Lucas* claim from the record in the present case, Suitum's principal argument amounts to a request that this Court reconsider its holding in *Penn Central*, not in light of another concrete factual context, but as an abstract, hypothetical issue. Any pronouncement on this issue will affect not only the parties to this case, but the scores of state and local governments nationwide that have created transferable development rights, and the thousands of private parties that sell, buy, and hold those rights. Yet, at this point, the issue "remain[s] unfocused because [it is] not pressed before the Court with that clear

concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (Frankfurter, J.). Under such circumstances, this Court can and should resolve the issue of ripeness presented in this case without accepting Suitum's invitation to dispense with the "clear concreteness" that has historically aided its vision.

A. The Court Should Not Reconsider In This Case Its Holding In *Penn Central* That TDRs Constitute A "Use" Of Property

In *Penn Central*, the owners and a lessee of Grand Central Terminal claimed that a New York City landmark law worked a taking because it "deprived them of any gainful use of their 'air rights' above the Terminal." 438 U.S. at 130. The *Penn Central* Court rejected their claim:

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.

Id. at 137. Although Suitum avoids any mention of *Penn Central*, her principal argument is a direct challenge to this portion of its holding. The only "use" that counts for purposes of the "economically beneficial use" test, argues Suitum, is physical activity on her land; other uses of her development rights, such as transfer to other parcels in the vicinity, must be ignored. Suitum thus asks this Court both to reject a "market value" interpretation of *Lucas* in favor of a "use" interpretation, and to reject a modern conception of "using" a bundle of rights in

favor of a physicalist conception of "using" land itself, all without a set of facts that would flesh out these abstract choices.

One example may help demonstrate why the lack of a concrete context to spur reflection on these choices may endanger the orderly development of substantive takings law. One might ordinarily assume that the rejection of a "market value" interpretation of *Lucas* in favor of a "physical use" interpretation would necessarily increase the number of cases deemed to be *Lucas* per se takings, since it would sweep in those cases in which land without remaining physical use retained a speculative market value, or a market value attributable to TDRs. This presumption, however, ignores what might be made quite obvious in a particular case: that all land ownership involves duties as well as rights, and that the economic burden of the duties may offset or outweigh the economic value of the rights.

For example, a zoning ordinance might permit the construction and operation of a factory on a particular parcel of land—an undeniably valuable physical use of the land. At the same time, however, governmentally-imposed liability for remediating soil contamination on that parcel might cause the parcel to have a market value of zero, or even a negative market value. *See, e.g., In re Dant & Russell, Inc.*, 853 F.2d 700, 702-703 (9th Cir. 1988) ("With [soil contamination] cleanup costs estimated at $10-30 million, the land has a substantial negative value no matter who ultimately takes possession."). In such a case, the zoning ordinance might work a *Lucas* per se taking under a market value interpretation, but not under a physical use interpretation. At least one lower court appears to have assumed that such offsetting burdens should be taken into account in a regulatory takings case. *See Bowles v. United States*, 31 Cl. Ct. 37, 48 (1994) ("Plaintiff's expert real estate appraiser . . . concluded . . . that Lot 29 actually became a liability after the

government action because [the lot's owner] would still be liable for annual property tax assessments.").

The case for taking offsetting burdens into account may be particularly strong when the duties are imposed as part of the regulatory scheme that has significantly curtailed the landowner's rights. *See, e.g., Penn Central,* 438 U.S. at 111 (noting that the New York City landmarks law "imposes a duty upon the owner to keep the exterior features of [a landmarked building] 'in good repair' "). Because Suitum's property retains both value and use, however, this case gives this Court no reason to consider these wider implications of adopting Suitum's proffered "physical use" interpretation. Potential traps such as this one should caution the Court against elaborating the *Lucas* per se category here.

One passage in Suitum's brief suggests that, even if the Court rejects the "physical use" interpretation in favor of a "bundle of rights use" interpretation, *no* use of her TDRs constitutes use of her previously existing development rights, since the TDRs do not perfectly correspond to those pre-existing rights. *See* Pet. Br. 20. Yet the *Penn Central* Court described the New York City TDR program as involving a transfer of pre-existing rights even though that program was arguably "far from ideal." *Penn Central,* 438 U.S. at 137 (citation omitted). In truth, the preservation of a landowner's pre-existing rights by means of TDRs is a matter of degree. No TDRs, Suitum's included, fulfill perfectly what may have been the pre-regulation expectations—reasonable or unreasonable—of landowners. Yet neither are TDRs in general, nor Suitum's in particular, merely unrelated compensation for rights that landowners have wholly lost.[17]

---

[17] The phenomenon of partial preservation of ownership rights is a familiar one, encountered every time a legislature modifies a jurisdiction's system of estates in land. For example, when a legislature provides that tenancies at will cannot be terminated without advance notice, it in effect converts those tenancies to

Because TDRs enable development to occur within a particular area—in this case, the Lake Tahoe Basin—their value, like the value of a landowner's pre-regulation rights but unlike the value of unrelated compensation, will rise and fall with the fortunes of the area. In that sense, Suitum's TDRs preserve her investment in the area. Neither does the distinction between TDRs and unrelated compensation become irrelevant because Suitum may have held her land, not merely as an investment, but also as a potential site for her own retirement home. The TDRs, unlike unrelated compensation, may directly aid her in her quest to build a retirement home in Lake Tahoe Basin, by enabling her to build a home on a Basin site that otherwise could not be developed to the same degree or at the same time. Whether this distinction should make a difference in a particular case is a question that this Court should not decide in the abstract—the only form in which it is presented in this case.

B. Any Abstract Pronouncement Will Likely Lead To Unnecessary Litigation About A Wide Variety Of Existing TDR Programs

Since this Court's decision in *Penn Central,* a growing number of state and local governments have become in-

---

periodic tenancies. *See Restatement (Second) of Property,* Landlord & Tenant § 1.6 Statutory Note, at 43-44 (1977) (listing statutes in 28 States which modify the common law rule that no period of advance notice is needed to terminate a tenancy at will).

It is hyperbolic, however, to say that the legislature has wholly deprived landlords of the reversionary interests corresponding to their tenants' tenancies at will, and has compensated them for that deprivation by granting them completely different reversionary interests that correspond to periodic tenancies. Rather, one would ordinarily describe the legislation as having modified one aspect of the landlord's interest while preserving others.

TDR legislation likewise partially modifies and partially preserves an owner's rights, although the degree of change may be greater. The flawed argument that TDRs are equivalent to cash compensation for lost rights is made most explicitly in the *amicus* brief of the Institute for Justice, at 9-10.

terested in the transfer of development rights as a means of effectuating a variety of important regulatory goals while partially preserving opportunities that landowners would otherwise lose. Initiation of this process involves the recognition of a new type of property right, generically known as a "transferable development right"—a right to erect a structure that occupies a certain surface area or amount of airspace, or to erect a structure with a particular use or at a particular time, which may be used on any one of a number of parcels of land. Recognition of such rights follows a venerable tradition in Anglo-American law of devising new property interests to meet social needs. One of the reasons that TDRs have flourished in the United States is that they can be easily understood in a legal culture that is already familiar with constitutional protection of such specialized property interests as right-of-way easements, *see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); flight easements, *see United States v. Causby*, 328 U.S. 256, 265 (1946); support rights, *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); rights to be free of annoyances produced by neighbors, *see Richards v. Washington Terminal Co.*, 233 U.S. 546, 553-55 (1914); materialmen's liens, *see Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); real estate liens, *see Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935); contractual agreements, *see Lynch v. United States*, 292 U.S. 571, 579 (1934), and trade secrets, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984).

Suitum's attack on TDRs as "arbitrarily created, intangible entitlements," Pet. Br. 15, is perplexing. It is her claim, after all, which as a *regulatory* takings claim wholly depends upon a conception of property as a "bundle of rights" rather than a physical thing—a conception that she champions elsewhere in her brief. *Id.* at 19. And it is that very conception that has led this Court both to acknowledge a wide variety of "intangible entitlements" as constitutionally protected property, and to recognize

that all such entitlements are "arbitrarily created" in the sense that they "are not created by the Constitution . . . [but] are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see Monsanto*, 467 U.S. at 1001-04 (holding that a trade secret recognized as property under Missouri law is protected by the Fifth Amendment Takings Clause). Thus, Suitum's general assault on TDRs is not only misguided, but inconsistent with an essential premise of her own claim.

Although the basic idea of TDRs is simple, there are a multitude of variations among TDR programs. Governments use TDRs to effectuate a variety of goals, such as historic preservation, environmental protection, fostering of agricultural activity, and preservation of unique natural features. *See* Rick Pruetz, *Putting Transfer of Development Rights to Work in California* 41 (1993). These diverse purposes lead to use of TDRs in settings ranging from downtown commercial districts, to suburban residential neighborhoods, to rural farms, forests, and wetlands.

In Washington, D.C., for example, TDRs have been used in the heart of the business district since the 1980s to save architectural and cultural landmarks such as the Warner Theatre and to restore historic churches such as Calvary Baptist Church and St. Peter's Roman Catholic Church. *See* D.C. Mun. Regs., tit. 11, § 1709. In San Francisco, TDRs have been used since the 1960s to preserve 250 noteworthy downtown structures. *See* San Francisco, Ca., Planning Code § 128; Pruetz, *Putting Transfer of Development Rights to Work* at 66-67.

In Montgomery County, Maryland, a TDR program in place for two decades has preserved 89,000 acres of land—one-third of the county—as farmland, by giving farmers an economic incentive to continue farming while channeling growth elsewhere in the county. *See* Maryland-

National Capital Park & Planning Commission, *Plowing New Ground* (rev. ed. 1990); James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 Yale J. on Reg. 369, 382 n. 36 (1989). In New Jersey, TDRs have been instrumental in preserving the Pinelands, a unique, fragile forest ecosystem, in the face of intensive growth in neighboring areas of the State. *See* Terrence D. Moore, *New Jersey's Special Place: The Pinelands National Preserve*, New Jersey Lawyer, April 1996, at 28. In Florida, TDRs form an essential part of a program that has saved tens of thousands of acres of the East Everglades. *See* Metropolitan Dade County, Fla., Code ch. 33B, art. II, div. 3.

TDR programs vary, not only in purpose and setting, but in their substantive details. While Dade County permits TDRs to be used throughout the County, *see id.* at § 33B-45, and Suitum's rights may be transferred within a 14,106 acre area, *see* Affidavit of Lyn Barnett in Support of Motion for Summary Judgment, J.A. 96, the TDRs at issue in *Penn Central* could be used only on adjacent or nearly adjacent parcels. *See Penn Central*, 438 U.S. at 114. While the *Penn Central* TDRs were apparently rights to construct additional floor area, *see id.*, Suitum's TDRs concern land coverage, residential units, and timing of development, *see supra* at 2-3, and TDRs in Cupertino, California are transferable rights to operate vehicles in the downtown business district. *See* Pruetz, *Putting Transfer of Development Rights to Work* at 75. Methods of calculating the TDRs credited to particular owners also differ in these cases and others. *Compare Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 256 (N.J. 1991) *with West Montgomery Cty. Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 522 A.2d 1328, 1331 (Md. 1987).

The existence of a large number of widely varying, successful TDR programs provides yet another reason why this Court should decline Suitum's invitation to issue

an abstract proclamation about the place of TDRs in a *Lucas* inquiry. The lack of a concrete factual context in this case not only impedes reflection about the consequences of a contemplated holding, it also deprives potential litigants and lower courts of the most important source of guidance in interpreting this Court's general declarations. Without the implicit limitations provided by a particular factual setting, a general remark will likely cause unnecessary litigation about widely varying TDR programs and regulatory settings. For this reason and the many others given above, this Court can and should decide the ripeness issue in this case without addressing the arguments belatedly raised by Suitum about the application of *Lucas* to TDR programs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT BRAUNEIS
Associate Professor of Law
The George Washington
University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6138

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the*
Amici Curiae

January 9, 1997

APPENDIX A

Excerpt from TRPA Land Capability Map
(adopted as part of TRPA Ordinance No. 4 (1972))

USE OF THE MAP

This map can be used to judge the risk of land damage and to assign use activities and intensities within hydrologic and topographic limitations. This study does not suggest that development should occur on the locations shown. It merely reveals which lands meet the criteria that have been selected. In addition, because of the scale of the map and the maps from which it was compiled, land capability levels within individual map units may not be uniform. For example, flat valley floors locally contain riparian zones along stream courses that meet the criteria for class 1b, although shown on the map as class 7. It is therefore necessary that the final land capability classification for individual parcels should be based on detailed site evaluation and more detailed application of the land capability criteria.

APPENDIX B

Excerpt from
TRPA Ordinance No. 4 (1972)

Section 9.00 Non-Conforming Uses, Structures and Alterations

9.11 *Existing Uses and Structures*

Uses of land and structures that do not conform to the regulations established by this ordinance and which lawfully existed on February 10, 1972, or which are to be created in connection with structures for which a valid building permit was issued on or before February 10, 1972 and upon which construction has commenced as allowed by such permit prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government and where necessary by the Agency within five (5) years prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government more than five (5) years prior to February 10, 1972 and there has been construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction prior to February 10, 1972 are nonconforming uses and structures and may be continued, transferred or sold, provided, however, in the case of a use to be created it shall occupy no greater area than planned at the time such building permit was issued or subdivision approved. If any such use ceases for a period of one (1) year, subsequent use of such land shall be in conformity with the regulations contained in this ordinance.

9.12 *Repair of Non-Conforming Uses and Structures*

Ordinary maintenance and repairs may be made to any non-conforming building or structure, or any use, provided, however that no structural alterations are made and that the cost of such work does not exceed 20% of the replacement value of such building or structure in any one year.

9.13 *Reconstruction of Non-Conforming Structures*

A non-conforming building or structure, or any building or structure devoted to a non-conforming use, damaged by fire or calamity may not be reconstructed other than in accordance with the provisions of this ordinance unless the cost of reconstruction does not exceed 50% of the replacement cost of such building or structure prior to the damage having occurred. Where reconstruction is permissible, the building[] as reconstructed shall have no greater floor area than it had prior to being damaged.

9.14 *Single Family Houses on Pre-Existing Lots and Parcels*

One single family house may be constructed on any existing legal lot or parcel of record as of February 10, 1972 that is located in any district except Tourist Commercial or Commercial, provided, however, that this section shall not apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972 and there has been no construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972.